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NOV 15 1945
CHARLES ELMORE CROPLEY
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In the
Supreme Court of the United States
October Term, 1945

No. 269

MILTON ROE SABIN and BERTHA FLORENCE SABIN,
Petitioners,
VERSUS
HOME OWNERS' LOAN CORPORATION, a Corporation, ET AL.,

PETITION FOR REHEARING

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NOVEMBER, 1945.

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Come now the above-named petitioners, Milton Roe Sabin and Bertha Florence Sabin, and present this their petition for a rehearing of the petition for *certiorari* in this case.

I.
Jurisdiction

The petition for *certiorari* was filed July 17, 1945, and was denied on October 22, 1945. This petition is filed within less than twenty-five days thereafter, under Rule 33 (28 U. S. C. A. No. 354).

II.

Reasons for Petition for Rehearing

The Sheriff's Deed herein, the only muniment of title as the basis for the alias writ of assistance under which petitioners were dispossessed of their home, was issued the same day the order confirming sale was made, although the latter order allowed petitioners twenty days to supersede. This the Circuit Court of Appeals and counsel for respondent, H. O. L. C., in their brief, recognize.

However, counsel for respondents argued in their brief filed in this Court (Page 6) that the record does not show when an appeal was perfected, and for that reason seek to distinguish *Johnston* v. *Johnson*, 104 Okla. 131, 230 Pac. 700. The Circuit Court of Appeals in its opinion, 147 Fed. (2d) 653, likewise attached some importance to the matter of appeal, saying, "We understand that no appeal from the order was *ever* perfected." This, admittedly, is an incorrect conclusion as to the facts, because the decision of the Supreme Court of Oklahoma, 187 Okla. 504, 105 Pac. (2d) 245, affirmatively shows that there *was* an appeal from that order.

Whether an appeal was perfected, or the time it was perfected, is not important. It would have been unusual if an appeal could have been perfected the same day the order was made.

The important point is that execution of the order was stayed for twenty days by the order itself, yet the deed was issued during that twenty days, i. e., on the same day. The

opinion of the Circuit Court of Appeals, and the brief of respondents in this Court, entirely overlooks this point.

A correct ruling, in accordance with the decisions, on that question of general and local law, must have resulted in a different disposition of the case.

III.

The Controlling Question

The controlling question, therefore, is: Whether a sheriff's deed is void when issued while execution was stayed?

IV.

Conflict of Decisions

On that question the affirmative holding of the Circuit Court of Appeals, wherein it says:

> "The contention that the deed is presently void because at the time of its execution and delivery an order was in force and effect staying execution of the judgment, is without merit,"

is in direct conflict with the applicable decisions of the Supreme Court of Oklahoma. No decision is cited to support this statement, wherefore it appears to have been based solely upon a misapprehension of the facts by that court.

Counsel for respondents in their brief filed in this Court say (Page 6) that *Johnston* v. *Johnson, supra,* is inapplicable because in that case an appeal had been perfected and that was the sole ground for the judgment. That is an improper interpretation of that case, as well as of the authorities therein cited.

In that case it was the interference with possession at a time when execution was stayed that was held to be without

authority of law. It is the *supersedeas*—the setting aside—that is important, whether that be by reason of an appeal perfected, by a writ issued for the purpose, by the provisions of the order, or the provisions of the statute.

Under the provisions of Section 546, Oklahoma Statutes 1931, then in effect, the stay "pending the giving of an undertaking" is as much a *supersedeas* setting aside the power of the sheriff to act and commanding him to desist from enforcement of the execution by issuing a sheriff's deed, as it is the stay which becomes operative by reason of the undertaking given later, and is as much a *supersedeas* as the stay of execution which is *continued* in effect after the actual filing of the appeal.

V.

Prayer

For the foregoing reasons, petitioners respectfully urge that a rehearing be granted; that upon further consideration the order of October 22, 1945, denying the petition for *certiorari* be revoked; and that the writ of *certiorari* issue.

HERBERT K. HYDE,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

LEE WILLIAMS, *of Counsel.*
NOVEMBER, 1945.

CERTIFICATE:

I, Herbert K. Hyde, attorney for the above-named petitioners, Milton Roe Sabin and Bertha Florence Sabin, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

HERBERT K. HYDE,
Attorney for Petitioners.

NOVEMBER, 1945.